DIVISION OF INSURANCE, *Petitioner*

v.

TUFTS INSURANCE COMPANY, *Respondent*

Docket No. E2005-03

DECISION ON MOTIONS FOR SUMMARY DECISION

I. Introduction and Procedural History

On April 8, 2005, the Massachusetts Division of Insurance ("Division") filed an Order to Show Cause ("OTSC") against Tufts Insurance Company ("Tufts") alleging that Tufts had marketed GradCare by Tufts Health Plan ("GradCare"), a health insurance product, without first obtaining the Division's approval of GradCare as a nongroup product, pursuant to G.L. c. 176M, ("c. 176M").[1] The Division alleged that Tufts had marketed a policy that violated G.L. c. 175, §110 (A) ("§110"), negotiated an unauthorized contract of insurance in violation of G.L. c. 175, §3, misrepresented the terms of an insurance policy in violation of G.L. c. 175, §181, delivered an insurance policy that violated G.L. c. 175, §189, engaged in unfair and deceptive practices in violation of G.L. c. 176D, §§2 and 3 and 211 CMR 40.06 (2), which regulates the marketing of health insurance. The Division sought relief in the form of a cease and desist order prohibiting Tufts from marketing the product and assessment of fines for the alleged violations.

[1] Although the respondent named in the OTSC is the Tufts Insurance Company, the parties refer to it, throughout this proceeding, as the Tufts Health Plan.

A notice of procedure issued on April 8, scheduling a prehearing conference for April 29, 2005, and a hearing for May 5. It also stated that the proceeding would be conducted in accordance with G.L. c. 30A and the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01, *et seq*. The Commissioner of Insurance designated me as presiding officer. Yvette Robinson, Esq. initially represented the Division in this matter. Upon her resignation, Elisabeth Ditomassi, Esq., General Counsel for the Division, and Abigail Morgan, Esq. succeeded her as counsel. John Kane, Esq., and Michele M. Garvin, Esq., of Ropes and Gray, represented Tufts.

On April 28, Tufts filed its answer ("Answer"), admitting to some allegations in the OTSC, denying others, and raising affirmative defenses. In summary, the Answer asserts that GradCare is a group insurance product and that, pursuant to §110, Tufts may offer it without first obtaining Division approval. Tufts denies that offering GradCare to Massachusetts customers violated the insurance laws, and seeks dismissal of the OTSC and an order directing the Commissioner not to interfere with the marketing of GradCare.

At the April 29 prehearing conference, the parties stated that the facts did not appear to be in dispute, and that they were preparing a joint stipulation of facts. They anticipated filing memoranda of law in support of their respective positions and arguing those positions at the hearing scheduled for May 5. On May 5, the parties reported that they had not yet finished a statement of agreed-upon facts, but anticipated that it would be completed shortly. They submitted a joint statement of the issues, which identified the matter under dispute as the characterization of GradCare as a group or nongroup health insurance product. The parties agreed that, if GradCare is found to be a group product, Tufts did not violate any insurance law by marketing it and, if GradCare is found to be a nongroup product, Tufts would have violated G.L. c. 175, §3, but no other insurance law. They agreed to dismissal of all claims for relief in the OTSC except for Claim II, which alleges a violation of G.L. c. 175, §3; the Division also withdrew all prayers for relief in the form of fines.

The parties proposed to take direct testimony from a witness for Tufts on May 5, and then to continue the hearing until May 9. On that date, the parties would file the stipulation of facts, cross-examine the Tufts witness, hear any witness for the Division, and present oral argument. Briefs would be filed on May 13. Based on the parties'

expectation that reply briefs would be unnecessary, no date was set for such submissions. In accordance with the parties' proposal, John Kingsdale, a Tufts senior vice-president for planning and development, offered direct testimony. On May 9, the parties filed their joint stipulation of agreed facts, cross-examined Mr. Kingsdale, and heard testimony from the Division's witness, Kevin Beagan, Director of the State Rating Bureau. The parties requested and were granted an enlargement of time, to May 18, to file their memoranda of law. On May 24, Tufts submitted a motion to permit it to file a reply brief, together with a copy of its proposed brief. A telephone conference took place on May 26 to hear argument on Tufts' motion. The Division opposed the motion, on the ground that the parties had previously agreed not to submit reply briefs. After consideration of arguments made by both sides, the motion was allowed, on condition that the Division be permitted to file a reply brief by June 23. The Division's reply brief was filed on that date. On August 4, 2005, the Division submitted a supplemental filing consisting of an affidavit from Mr. Beagan.

The Stipulation of Agreed Facts

On or about July 30, 2002, Tufts filed with the Division of Insurance a product known as PPO Option 2, a variant of a certificate of commercial insurance sold by Tufts, called Advantage PPO MA-TICOPPO-001.[2] The Division approved PPO Option 2 on or about January 7, 2003. By letter dated February 10, 2005, Tufts notified the Division that it intended to market the PPO Option 2 product to colleges and universities under the name GradCare. Graduating seniors at an institution that purchased GradCare would be eligible to enroll in that institution's GradCare plan during a set enrollment period. By letter dated February 28, 2005, the Division notified Tufts that GradCare must be marketed pursuant to c. 176M as a nongroup health care product, not pursuant to §110 as a group product. Before February 28, 2005, Tufts marketed GradCare to at least one educational institution, without having sought review by the Division under c. 176M. Although one college signed a contract, Tufts did not sign the contract and it never took effect.

[2] The product in question is a preferred provider plan, which must be approved by the Division pursuant to G.L. c. 176*I*.

Tufts intends to sell GradCare exclusively to colleges and universities which would, by purchasing the product, become Tufts policyholders. The beneficiaries of the policy would be graduating seniors who elected to participate in the plan. The educational institution would offer GradCare to its seniors before graduation; the plan's enrollment period would begin thirty days before graduation and conclude 120 days after that date. Product information would be made available and applications accepted throughout that enrollment period. The educational institution would determine eligibility to participate in GradCare based on its student records. It would also negotiate with Tufts on the terms of the policy, including the premiums. Tufts intends to underwrite GradCare as a group, rather than a nongroup, product, in order to be more affordable to colleges and universities. Some nongroup policies offered by Tufts' competitors, with comparable premium rates, have significant deductibles ($5,000 v. $1,500) and offer no prescription drug coverage.

Attached to the stipulated facts are four exhibits: 1) Tufts' submission to the Division on the PPO Option 2; 2) correspondence dated January 7, 2003 from the Division to Tufts approving the PPO Option 2; 3) correspondence and related documents exchanged between Tufts and the Division, dated February 10, February 28, March 3, March 4, March 10, March 17, March 22 and March 30, 2005; and 4) a document showing, a) for the five-year period from 1996 through 2000, the percentage of college graduates who were uninsured for a period of time in the year following graduation; and b) reporting the results of a Tufts survey of 2004 college graduates who were not expected to have a job with health insurance benefits immediately after graduation.

II. The Parties' Arguments

The parties agree that the sole controverted legal issue in this matter is whether GradCare is a group insurance product permitted by §110, and therefore exempt from Division approval, or whether it is a nongroup product that must comply with the requirements of c. 176M. Their positions on this issue are set out in their respective oral arguments, memoranda of law and reply briefs.

A. The Oral Arguments and Memoranda of Law

1. The Division

The Division argues that c. 176M, because it is intended to provide individuals with access to affordable health insurance, should be broadly interpreted to cover all health plans other than those specifically exempt from its provisions. Contrasting the characteristics of individual health insurance available before enactment of the statute with plans offered thereafter, the Division notes that premiums must now fall within rating bands, and that policies must be guaranteed to be available and renewable and to provide standard minimum coverage. The new statute, it asserts, improved access for people with pre-existing medical conditions or medical histories, and limited insurer ability to charge higher premiums for such individuals based on underwriting, thus preventing them from charging those insured in the nongroup market more than double what they charge their "best" insureds.

In order to effect the principles underlying c. 176M, the Division asserts, the pool of individuals who are insured under policies issued pursuant to that statute must be sufficiently large to spread the risk adequately. It notes that because some of these insureds pose significant health risks, it is important to retain in the pool sufficient numbers of healthy people to spread losses and keep premium under control. To that end, the Division argues, the effectiveness of c. 176M depends on maintaining a diverse pool of risks of all ages and in all states of health.

Describing GradCare as an attempt to carve out from the c. 176M risk pool a class of good, young risks, the Division characterizes it as anathema to the stated purpose of the statute, to provide health insurance to all at affordable costs and with standard benefits. By making health insurance available to a wide group, the Division asserts, the statute helps keep people out of the free care pool. If products such as GradCare became the norm, the DOI asserts, the pool of those eligible for nongroup coverage could potentially lose its statistically healthier members, thus increasing premiums for the remaining members of the pool. It further points out that GradCare, if viewed as group coverage, would allow favorable underwriting without Division regulation and without the fundamental protections of c. 176M. The Division argues that great care should be taken before removing a sector of the general pool of those who are not eligible for group

coverage and placing it under the group statute; if there is any ambiguity about a product, it concludes, the decision should go in favor of inclusion in the category of plans regulated under c. 176M.

The Division argues that the language of c. 176M seeks to ensure the broadest possible application of that section and supports the Division's position that GradCare is within its ambit. It points out that the definition of "health plan" in section 1 of the statute includes any "individual, general blanket or group policy of health insurance," inferring from that construction that a group policy is subject to c. 176M law unless it is specifically exempt from it. It notes that Qualified Student Health Insurance Programs ("QSHIPs") are exempt from 176M, as are small group health plans developed under G.L. c. 176J ("c. 176J").[3] Further, the Division points out, a nongroup health plan is defined as one issued, renewed or delivered to a natural person who is a resident of Massachusetts, including a plan that issues certificates to natural persons as evidence of coverage under a policy issued to a trust or association.

The Division asserts that the inclusion of group plans in the definition of health plans to be regulated under c. 176M, combined with the specific exclusion of QSHIPs and c. 176J plans, demonstrates a legislative intent to apply the statute to regulate some group plans. It argues that there would be no need to exclude QSHIPs and c. 176J plans specifically unless the statute was intended to cover some group health coverage.

The Division argues that c. 176M considers health plans that it regulates to be those which issue an evidence of coverage to natural persons. That definition, it asserts, encompasses GradCare because Tufts plans to issue policies to all college graduates who enroll in the plan. It characterizes the argument that GradCare is exempt from c. 176M because the actual policy will be issued to an institution, rather than a natural person, as overly formalistic, arguing that it fails to acknowledge the broad purpose of c. 176M. Further, the Division argues, it is illogical to include group plans within the definition of nongroup health plan, and then exclude them if the issuer manipulates the delivery system by first delivering the policy to an institution and then to natural persons.

[3] Chapter 176J regulates health insurance plans issued to eligible small businesses, *i.e.*, those with no more than fifty employees.

The Division contends that, if c. 176M is found to apply only to policies issued directly to natural persons, GradCare should be viewed as an association policy that is within the scope of the statute. In effect, it argues, GradCare is more like an association policy than a group plan because it will insure more applicants after they graduate, and are therefore alumni. As alumni, they would have common interests and, in this case, a common need for health insurance. Even if GradCare is marketed to a college or university rather than to its alumni association, the Division argues, the institution is not acting to insure students under §110. It asserts that Tufts is, in effect, exalting form over substance, targeting a group whose members are associated because of their status as alumni, and ignoring the underlying purpose of c. 176M.

The Division points out that although §110 (A)(d) permits a group health plan to be issued to a college, school or other institution of learning, it qualifies the classes of persons who may be covered under such plans, permitting inclusion of students but not of graduates. The Division argues that the legislative history of §110 confirms that group coverage under that statute was intended to be limited, and that even though its scope has been expanded over time, the expansion has been to specific and limited groups. GradCare, while it may cover some applicants for a thirty-day period before graduation, is targeted at graduates who are no longer students, and will not be students during most of the period of coverage. Their affiliation with the school is as alumni, a class of people who are not squarely identified in §110 as people who may be covered under a group policy. Unless §110 specifies that a class may be covered under the group policy, the Division argues, the class is outside the limited, and narrowly constructed, corners of that statute. The Division asserts that if the legislature had intended to include alumni as a class that could be covered under a group policy, it could have done so.

The Division argues that treating GradCare as an unregulated group product would be inconsistent with the system now in place for ensuring that students at institutions of higher learning have health insurance coverage. QSHIPs, which are regulated through the Division of Health Care Finance and Policy, cover students for twelve months at a time, for a period that starts at the beginning of one academic year and concludes at the

beginning of the next academic year.[4] Therefore, the DOI asserts, such plans can continue to cover students during their immediate transition to the working world. Under the QSHIP statute, the only alternative to purchasing a QSHIP is coverage under a policy with comparable benefits. The DOI points out that an individual who purchased GradCare before graduation would be covered by it and QSHIP for a four month period, an unnecessary duplication of coverage. Because GradCare does not offer coverage as comprehensive as does a QSHIP, the DOI argues, it would be inferior to it and would not be considered a policy with comparable benefits. Therefore, the DOI concludes, GradCare is inconsistent with the insurance laws on coverage for students and recent graduates. If GradCare is not covered under c. 176M, it argues, it would be unregulated which is contrary to the purpose of QSHIPs. It would be, the DOI asserts, inappropriate to allow an unregulated product to provide coverage when a regulated product is in place for one-third of the period that the unregulated product is intended to be effective.

Finally, the Division argues, Tufts position that GradCare is a product that the class of new college graduates needs is misguided. Health insurance, it states, is vitally important to all individuals; offering coverage to a class of current degree recipients can be done as a c. 176M product with Division approval. In effect, the Division argues, allowing GradCare to be sold as a group product under §110 would permit it to offer lower deductibles than those available under a product developed in accordance with c. 176M, and that marketplace equity does not favor characterizing a product solely on the ground that it may be more competitive in terms of price.

2. Tufts

Tufts argues that the Division fundamentally mischaracterizes GradCare as an individual health insurance product. It asserts that GradCare would benefit a class of individuals, typically young adults who, after college graduation, are no longer covered by a QSHIP or eligible for dependent coverage under a parent's policy, but have, according to a Tufts study, a need for health insurance. Tufts argues that members of the targeted class typically lack financial resources to purchase individual coverage. It notes that underwriting GradCare as a group plan makes the product more affordable, and points out

[4] G.L. c. 15A, §18, enacted in 1988, and effective as of September 1, 1989, requires students to participate in QSHIPs. Regulations are found at 114.6 CMR 3.00 *et seq*. A copy of the regulations is attached to the Tufts memorandum of law.

that GradCare offers lower deductibles and better coverage than nongroup policies with comparable premium rates. Further, Tufts argues, young people who do not have jobs or jobs that do not offer health insurance benefits may be forced into the free care pool.

Tufts argues that, because a health plan cannot be both a group [§110] and a nongroup [c. 176M] plan for regulatory purposes, the Division's position that c. 176M regulates group plans that are not specifically exempt from its coverage, as well as individual plans, is incorrect. GradCare, it asserts, is a blanket or general policy issued to a school or college, institutions that are, under §110, identified as permissible group sponsors, and is structured like other group products. GradCare will be sold to a policyholder that will negotiate the terms of and premiums for the policy and determine eligibility to participate in the program. The policy is guaranteed renewable as required under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Coverage is extended to eligible individuals by the purchasing institution, which would disseminate information on GradCare. Tufts would distribute evidences of coverage to participating individuals consistent with its legal obligations to do so.

The plain language of §110, Tufts argues, demonstrates that it regulates group health policies issued to an enumerated list of groups including, since 1930, colleges and universities. Pointing to Mr. Beagan's testimony that group health insurance can cover non-employee groups, Tufts argues that graduating seniors are just such a group. It asserts that if colleges and universities were limited to offering group coverage to their employees, there would have been no need to add subsection (d) to §110(A). Tufts contends that the Division's narrow reading of §110, to exclude GradCare as a group plan, incorrectly construes the statute. It argues that §110(A) places no qualification or limitation on the classes of individuals who may be covered under group policies. Recent graduates, Tufts asserts, are legitimate members of a class of insureds established while they were college seniors, whose eligibility for GradCare depends on their status as graduating students. It describes the product as one that covers people during a transitional period that begins while they are students and is made available for a time thereafter because they qualified for the program while they were students. That the group includes both recent graduates and students, is not, according to Tufts, a reason to determine that GradCare is not a permissible group product. It asserts that the group of

potential insureds does not stop being a legitimate group when it graduates; the individuals stop being students and become alumni. Further, it analogizes GradCare to QSHIPs, which are group products permissible under §110 and, because they cover participants for a full 365 day year, cover people whose status may change from student to graduate during the coverage period. Even if students may be characterized as alumni after graduation, Tufts asserts that change is not relevant, because they participated in the QSHIP as a result of student status. Tufts contends that the Division's position ignores the intent of §110 as well as its current application to include QSHIPs, which also extend coverage beyond graduation.

Tufts argues that GradCare is a permissible group under §110, pointing out that not all policies issued to sponsoring groups under that statute are restricted to providing coverage to employees. It notes that §110 permits group policies to cover non-employees, such as members of association. GradCare will be issued to an educational institution, which will sign the policy and may negotiate its terms as well as review the benefits it provides. Therefore, Tufts argues, GradCare will be offered pursuant to the same type of monitoring and responsibility for review that employers provide for groups.

Reviewing the history of legislative action on health insurance, Tufts argues that c. 176M was enacted in 1996 for the purpose of requiring commercial carriers that participated in the nongroup health insurance market to meet minimum regulatory standards. The plain language of the statute, it contends, makes the chapter applicable to the nongroup or individual insurance market. Tufts asserts that, with two exceptions, nothing in c. 176M says that it applies to group policies. Those exceptions are for policies issued to individuals who are converting group coverage to an individual policy, and for policies evidencing individual coverage under a policy issued to a trust or association. Tufts argues that GradCare is not a conversion product, that colleges and universities do not fall within any definition of association in the insurance laws, and that GradCare therefore is not a group policy that may be regulated under c. 176M. In further support of its position, Tufts points to Mr. Beagan's testimony that colleges and universities are not associations. It asserts that questions relating to the status of GradCare applicants as members of an alumni association are misleading and irrelevant, because GradCare will not be issued to such an association. It points out that payment of dues to an association

will not be a criterion for eligibility for GradCare; eligibility relates solely to the applicant's status as a graduating senior.

Further, Tufts argues, in order to be regulated under c. 176M, the policy or certificate must be issued to a natural person. GradCare, it points out, will not be issued to a natural person. The carrier is mandated to deliver an evidence of coverage to a natural person, but the policy is not issued to a natural person. Tufts reiterates that colleges and universities are not trusts or associations within the meaning of c. 176M.

Tufts argues that there is no overlap between 110 and 176M. It comments that the legislature amended G.L. c. 175, § 108 to provide that in the event of a conflict, c. 176M would govern. It did not amend §110, Tufts argues, because the latter relates only to group policies and could not conflict with the individual market reform contemplated by c. 176M. In addition, Tufts asserts, 176M was not intended to override the types of groups that are permitted under §110, and should not be interpreted to have that effect. The Division's interpretation, it argues, would remove from §110 schools with respect to their students, except in connection with a QSHIP, volunteer groups and non-employee groups under any of the categories.

B. The Reply Briefs

1. Tufts

In the brief submitted in response to the Division's post-hearing memorandum, Tufts asserts, overall, that the Division has advanced invalid and improper interpretations of clear and unambiguous statutes in order to manipulate the nongroup insurance market. In support of its position, it raises five specific points. First, Tufts characterizes as "fundamentally flawed" the Division's explanation of the reasons for excluding QSHIPs and products issued under G.L. c. 176J from the definition of "nongroup" health plans. Tufts argues that a more likely reason for the omission is that QSHIPs can be offered to students on an individual (nongroup) basis, and c. 176J permits "groups" of one person. It argues that the exception is intended to exclude QSHIP and Small Group plans that are issued to "natural persons" from a definition that relates only to plans issued to natural persons, and does not apply to a QSHIP or c. 176J product offered on a group basis.

Second, Tufts argues that the Division's position that a policy "marketed to" or targeted to a "group of similarly situated people with a shared common interest" is, for

purposes of c. 176M, a policy issued to an association, is equally applicable to group health insurance issued to employer groups. It asserts that employees of a company are "similarly situated" and have a shared common interest in employment and maintaining health insurance. If taken to its limit, Tufts asserts, the Division's argument would allow all group health insurance that involves a certificate issued to a natural person to be defined as a nongroup plan under c. 176M. It notes that the Division has not taken that approach to regulation, and that to do so now would be inconsistent with past practice. Further Tufts asserts, to apply it selectively to colleges and universities is both illogical and unfair.

Tufts argues that the Division's suggestion that policies covering college students were excluded from c. 175, §108 because the legislature knew they would be regulated as QSHIPs by the Division of Health Care Finance does not recognize that colleges were established as proper group sponsors long before enactment of the QSHIP statute. It notes that colleges were identified as group sponsors in 1930, while the statute mandating QSHIPs was enacted in 1991. Tufts concludes that in 1930, when the legislature allowed colleges to be group sponsors, it intended for all such group plans to be unregulated.

Tufts asserts that the Division's argument that GradCare would give Tufts an unfair marketing advantage is based on the premise that Tufts' competitors do not believe that such a product would be a nongroup product. It argues that there is no evidentiary basis for that statement, and no reason to infer, from the absence of competition for GradCare in the market, that any company has concluded that a product offering such coverage must be regulated under c. 176M.

Tufts argues, as well, that the Division's assertion that the legislature intended to bring the widest array of health plans under the nongroup law misconstrues the legislature's intent and distorts Mr. Beagan's testimony. It points to the Division's statements that c. 176M was enacted to reform underwriting practices for existing individual coverage, and to create a pool where everyone could buy coverage based on the same underwriting practices. Tufts alleges that the legislature did not intend to change the nature of the pool of those requiring individual coverage by bringing groups into the pool, but sought to change the options available to that pool and to allow more uninsured individuals an opportunity to participate.

2. The Division

The Division, countering Tufts' statements, argues that its positions defy credulity and strain the rules of statutory construction. The Division reiterates that GradCare is a nongroup product subject to c. 176M. It asserts that Tufts' efforts to analogize GradCare to QSHIPs that offer coverage for a period following graduation is flawed and irrelevant to this dispute. The Division points out that recent graduates who remain enrolled in QSHIPs are not regulated as individuals enrolled in the nongroup market because QSHIP plans are specifically exempt from c. 176M. The status of the individuals as recent graduates is not determinative of their qualification to be a group member. The Division argues that a logical interpretation of c. 176M means that a recent college graduate, who has no continuing employment or student association with the educational institution, is not eligible to be a member of a group plan offered through that institution.

Second, the Division argues, Tufts' interpretation of §110(A) omits qualifying language that limits the groups that may be covered under general or blanket insurance policies; specifically, it notes, Tufts omits the phrase "the students or patients thereof, as the case may be." The Division reiterates its position that Tufts is attempting to provide coverage to individuals who are not members of a group under §110. Further, it argues, Tufts' position that GradCare is a group product because it is sold exclusively to colleges, schools or other institutions of learning does not recognize the full scope and purpose of the product. The Division argues that Tufts is attempting to provide health insurance to individuals who, unless enumerated in §110(A) or exempt from c. 176M, would not be eligible for group health insurance. That the Division recognizes that students may be a valid non-employee group does not, it argues, support a conclusion that GradCare serves the needs of students or otherwise satisfies the requirements of §110(A). The Division points out that, although GradCare would be available for thirty days before a student graduates, it does not, in any meaningful sense, benefit students. It asserts that no current student would, under QSHIP, require the product, and that purchasing GradCare while still a student is unnecessary and would be inadvisable. The futility of purchasing duplicate health insurance for enrolled students, the Division argues, highlights that GradCare is intended to cover graduates, a distinct group from students. The Division concludes that Tufts is attempting to manufacture a loophole that would allow it to use

colleges to circumvent nongroup regulation and to market insurance to low-risk, high profit populations. Such a loophole, it argues, is antithetical to the goal of c. 176M and would encourage insurers to further attempts of classify low-risk individuals as valid groups.

The Division argues that Tufts' assertion that §110(A) places no qualifications or limitations on the classes of individuals who may be covered under group policies issued to entities named in the statute inaccurately interprets the statute. It asserts that Tufts characterizes the statutory language referring to officers, union or association members, employees, students, patients, as examples of the classes that may be covered, rather than as a limitation on the permissible classes. To the contrary, the Division argues, §110(A) unambiguously identifies a list of classes of potential insureds. The legislative history of the statute, it notes, demonstrates that it has been amended at various time since 1932 to add to the enumerated beneficiaries of group policies. The Division argues that, had the legislature intended this list to be illustrative rather than exhaustive, it would not have specifically defined groups such as "newspaper boys" and "volunteer fire departments." Tufts effort to expand §110(A) to allow coverage to virtually any group, the Division asserts, eviscerates both the purpose of that statute and of c. 176M.

The points in Tufts' reply brief, the Division argues, fail to establish that GradCare is something other than a nongroup health insurance product to be marketed and sold through colleges to their graduates. It asserts that Tufts' statutory interpretations remain unconvincing, and that it has not set forth any sound argument to support its position that status as a recent college graduate qualifies a person to be a member of a group under §110(A). If Tufts intends to serve this particular population, the Division argues, it must do with in compliance with c. 176M.

III. Discussion and Analysis

In January 2003, pursuant to G.L. c. 176*I*, the Division approved an insured preferred provider plan known as the Tufts PPO Option 2. The PPO, according to the generic certificate of insurance attached to the stipulation as Exhibit 1, is marketed as a group plan. Applicants who seek to participate in the plan must meet eligibility rules established by the sponsoring group or Tufts; coverage terminates on the date the insured no longer meets those rules. In February 2005, Tufts notified the Division that it intended

to market the PPO Option 2 Plan to colleges and universities under the name GradCare. The class of eligible potential participants would be seniors graduating from the purchasing institution, who could choose to apply for GradCare during a set enrollment period starting a month before the institution's graduation date and remaining open for 120 days thereafter. GradCare would provide health insurance coverage for one year after the effective date. The Division advised Tufts that GradCare must be marketed as a nongroup health care product pursuant to c. 176M, not as a group product pursuant to §110 of c. 175.

The single issue to be addressed in this decision is whether GradCare is a group insurance product that Tufts may offer, consistent with §110, to a class of beneficiaries through a policy sold to an educational institution, or a nongroup insurance product that is subject to Division approval and regulation pursuant to c. 176M. Each party argues, in essence, that the language and legislative history of these statutes supports its position, and that public policy considerations further merit a finding in its favor.

Analysis of the language of both §110 and c. 176M demonstrates that, by their terms, both address health insurance coverage provided to classes of individuals under a policy issued to a third party. Section 110, enacted in 1910 as Section 6 of a statute that set out requirements for the approval and content of health insurance policies, excepted from the law

> "any general or blanket policy of insurance issued to any municipal corporation or department thereof, or to any corporation, co-partnership, association or individual employer, police or fire department, underwriters corps, salvage bureau or like associations or organizations, where the officers, members or employees or classes or departments thereof are insured against specified accidental bodily injuries or diseases while exposed to the hazards of the occupation or otherwise…"[5]

Chapter 176M was enacted in 1996 and amended in 2000. Section 1, in pertinent part, defines a "health plan" as "any individual, general, blanket or group policy of health, accident or sickness insurance issued by an insurer licensed under chapter one hundred seventy-five or the laws of any other jurisdiction." It then defines "nongroup health plan" as any health plan "issued, renewed or delivered within or without the commonwealth to a

[5] It also excepted the beneficiary certificates or policies issued by fraternal benefit societies, associations operating on a lodge system.

natural person who is a resident of the commonwealth, including a certificate issued to an eligible natural person which evidences coverage under a policy or contract issued, renewed or delivered to a trust or association." A "nongroup" health plan, then, is defined in terms of the covered person's status as a "natural person," not by the type of insurance policy (*i.e.*, general, blanket or group) that provides the coverage. Two types of health plans issued to natural persons are specifically exempt from regulation under c. 176M: Qualified student health insurance plans ("QSHIPs") issued pursuant to G.L. c. 15A, §18, and small group health insurance plans issued or renewed pursuant to G.L. c. 176J. Inclusion of the term "group" in c. 176M demonstrates that the legislature contemplated that not all group insurance would be regulated exclusively under §110.

Although §110, as initially enacted and in its current configuration, refers only to "general or blanket" insurance policies, I do not find significant the omission of a direct reference to group coverage. Recent case law demonstrates that coverage authorized under that statute is commonly referred to as group insurance coverage.[6] Similarly, although c. 176M is entitled "Nongroup Health Insurance," its regulatory scope includes general, blanket and group, as well as individual insurance policies. It is a well-settled principle of law that, although the title to a statute may be considered in determining its construction, its apparent scope and extent cannot be restricted by the title itself. *Charles I. Hosmer, Inc. v. Commonwealth*, 302 Mass. 495, 501 (1938); *Inspector of Buildings of Watertown v. Nelson*, 257 Mass. 346, 350 (1926). I find, then, that the statutory language in both §110 and c. 176M makes both statutes applicable to "general, blanket or group" health plans. For that reason, an analysis of the application of those statutes to GradCare must start from the premise that statutes addressing a common matter, in this case group health insurance, should be interpreted so as to create a harmonious statutory scheme. *See, e.g., Dowling v. Registrar of Motor Vehicles*, 425 Mass. 523 (1997).

Tufts argues that GradCare is a group product within the scope of §110 because it will be issued to a college or university, entities to which, under that statute, insurers may issue group or blanket insurance policies. That group health insurance may be issued to a

[6] See, e.g., *Connors v. City of Boston*, 430 Mass. 31 (1999) (policy covering employees of City of Boston); *Teamsters, Chauffeurs, Warehousemen & Helpers Union v. Chatman*, 404 Mass. 365 (1989) (policy covering union members); *Panesis v. Loyal Protective Live Ins. Co.*, 5 Mass. App. 66 (1977) (policy covering employees of a business enterprise).

college or university is not disputed in this proceeding. The Division argues, however, that §110 limits the classes of people who may be covered under such policies. Because GradCare, it asserts, targets a class that is not specifically allowed under §110, it cannot be characterized as a group insurance product. Tufts does not dispute that §110 enumerates groups or classes of people who may be covered under a group health policy, but argues that the statutory language should not be viewed as limiting coverage to those enumerated groups or classes but, rather, should be interpreted as identifying examples of permitted categories.

I am persuaded that the legislative history of what is now codified as §110 supports the Division's position. Section 110 was initially enacted as a subsection of a statute setting out requirements for health and accident insurance that included prior approval of the policy form and incorporation of a set of standard policy provisions.[7] As noted above, the legislature exempted from those general requirements "general or blanket" policies issued to specified entities. In the ninety-five years since its enactment, §110 has been amended many times; the amendments that are relevant to this proceeding are those that address the list of entities to which insurers may issue group health insurance.[8] A 1919 amendment revised §110 to provide that the standards for accident and health policies did not apply to or affect any general or blanket policy of insurance issued to "any employer, whether an individual, corporation, co-partnership or association, or to any municipal corporation or department thereof, police or fire department, underwriters corps or salvage bureau or like organization" that would insure the "officers, members, employees or classes or departments thereof." Legislation enacted in 1921 further defined a general or blanket policy, for purposes of §110, as one that, if the premiums are paid by the employer and employees jointly and the benefits are offered to all employees, covered not less than 75 percent of employees and association members.

In 1930, the legislature added "any college, school or other institution of learning or to the head or principal thereof, or to any organization for health, recreational or

[7] The legislation was codified as G.L. c. 175, §108.

[8] In addition to amendments addressing the entities to which group insurance may be issued, the legislature has enacted provisions specifying the benefits that such coverage must provide.

military instruction or treatment" to the list of entities to which an insurer could issue a general or blanket health insurance policy. It also added to the classes of persons to be covered by such insurance, following the phrase "or department thereof," "or the students or patients," and further provided that the classes would be "insured against specified accidental bodily injuries or diseases while exposed to the hazards of the occupation, course of instruction or treatment, or otherwise."

Section 110 was again amended in 1943, to permit issuance of general or blanket health insurance policies 1) to any association of state, county or municipal employees or to an association of employees in two or more municipalities, to cover the members of the association; and 2) to a trade union. Six years later, in 1949, it was further amended to allow such policies to be issued to "other associations of wage workers" as well as to trade unions, and to the trustees of a fund established by combinations of employers in the same industry, multiple trade unions, or employers and trade unions. In 1950, the provision that allows general or blanket health insurance policies to be issued to fire departments was amended to add volunteer fire departments. A 1952 amendment allowed any policy issued to an employer to include the officers, managers and employees of enterprises under common control, including, but not limited to, affiliated or subsidiary corporations, and to include retired employees. The statute was again amended in 1954 to add to the list of entities to which a policy could be issued "associations of employers or employees in the same or related industry having a constitution and by-laws and formed in good faith for purposes other than that of obtaining insurance for its association members and employees." In 1963, the legislature allowed insurers to issue group health policies to newspapers or newspaper distributors in order to insure independent contractor newsboys.

A 1964 amendment authorized insurers to issue group health policies to banks or groups of banks, to cover a group of persons who are debtors of such bank or group of banks, up to the amount of the indebtedness of such debtors; the following year the section was revised to allow, in summary, financial institutions, in addition to banks to hold such policies to insure debtors, guarantors or purchasers against the loss to time resulting from disease or specific bodily injuries.

I am persuaded that, examined as a whole, the legislative history of §110 demonstrates an initial intent to carve out from the statute generally applicable to health

and accident insurance an exception for policies issued to enumerated entities for the purpose of covering specified classes of people associated with those entities. The language amending §110 to permit insurers to issue group health insurance to colleges and universities also added "students" to the classes of persons who could be covered.[9] The precision with which the legislature, over time, identifies both the permissible group policyholders and the classes of persons to be covered by group insurance persuades me that it is reasonable to view as unambiguously describing the entities to which group insurance may be issued and limiting the classes of persons that such policies may cover.[10] In theory, for example, absent statutory language limiting the classes of beneficiaries, a municipality could insure all its residents. The precision in §110 is consistent with the legislature's approach to group life insurance. *See*, G.L. c. 175, §133 and §134.[11]

Tufts provides no support for its argument that the entities and classes set forth in §110 should be viewed as examples. That GradCare will be issued as a group policy to a college or university does not provide a sufficient basis for finding that it falls within the category of group insurance permitted under §110. It must also cover a class of people that is specified in that statute.

Tufts argues that GradCare may be categorized as health insurance provided to students because the class of people eligible for the plan is established while its members are college seniors, even though it covers them after graduation. In support of its position, Tufts analogizes GradCare to a QSHIP, arguing that QSHIPs are group products under §110, and that they cover students whose status changes during the coverage period. Its arguments are not persuasive. G. L. c. 15A, §18 requires students to participate in a QSHIP and institutions of higher education to submit annual reports detailing their procedures for complying with the statute, but does not prescribe a particular form for a

[9] Under §110, a college or university, in its capacity as an employer, could be a policyholder on group insurance that covers its employees and their dependents and its officers; such coverage is not relevant to this dispute. The linkage of the language that allows group insurance to be issued to a college, university or other educational institution with language enlarging the covered classes to include students supports a conclusion that a specific provision was required to enable educational institutions to provide insurance for that group.

[10] Tufts argues that the statute must be interpreted broadly because of the many configurations in the academic community, such as "non-employed" or visiting faculty, that might be covered under group insurance issued to an educational institution. The issue is not how an academic institution defines those who fall within permitted classes under §110.

[11] Section 133 defines group life insurance in terms of the entities that may purchase it; §134 sets specific requirements for such policies.

QSHIP. Because §110 permits colleges and universities to provide group insurance for students, a QSHIP may be offered as group coverage under that section, but need not be. Even assuming, *arguendo*, that GradCare is somewhat analogous to a QSHIP, that similarity is not a factor that would determine that GradCare must be a group product allowable under §110.[12]

I do not find persuasive Tufts' argument that GradCare should be viewed as student coverage because it will be offered to college seniors before they graduate, and may have an effective date prior to graduation. As a general matter, eligibility for group insurance coverage depends on meeting and maintaining eligibility rules established for the group.[13] Because, for example, eligibility for coverage through an employer group requires that the person remain employed, legislative action was necessary to extend group coverage to an insured person who leaves the covered group. *See,* G.L. c. 175, §110D.

Student status may render a person eligible for insurance under a group policy, whether as a dependent on a parent's policy or under a policy issued to the educational institution, as permitted under §110. Continuation of eligibility that is determined by student status is dependent on retention of that status. Nothing in this record indicates that a graduating student, with the exception of one who is covered in Massachusetts under a QSHIP which specifically provides for coverage during a post-graduation time period, remains eligible to participate in a group that defines membership in terms of student status.[14] That QSHIPs, by regulation promulgated pursuant to their enabling legislation, may cover students for some period post-graduation does not support the principle that eligibility for other types of group health insurance coverage based on student status continues after the insured person is no longer a student.[15] To the extent that GradCare could cover students for a brief period before they graduate, it might be characterized as

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[12] Because c. 176M applies to individual, general, blanket and group coverage, the exemption for QSHIPs relates to a product covering a particular class, students, not to the format in which it is offered.

[13] See, for example, the provisions in the PPO certificate of insurance submitted as Exhibit 1 to the statement of stipulated facts, particularly pages 2-1 (Eligibility) and 4-1 (Reasons coverage ends).

[14] QSHIPs cover students for a school year, defined in 114.6 CMR 3.02 as the 365 day period commencing on the first day of the fall semester at an institution of higher education.

[15] The opposite appears to be true. Tufts argues that GradCare is needed because students who have been covered as dependents under policies covering their parents lose that coverage when they are no longer students and therefore no longer qualify as dependents.

student insurance.[16] However, I find no legal authority for carrying over student status so as to allow new graduates to be characterized as students for the purpose of including them as members of a class that may be covered under a group health insurance policy issued to a college or university pursuant to §110.

Furthermore, even though a person could, while still a student, be covered under GradCare for a short period of time, such coverage might well be duplicative of insurance in place under a QSHIP, or a policy covering the student as a dependent. Tufts argues that GradCare should be approved as a group product because it will provide a more economical alternative to purchasing nongroup coverage. The same economic factors, if applied to a decision on the timing of an application for GradCare, weigh in favor of delaying the effective date of GradCare coverage to coordinate with the termination of eligibility for the existing plan.[17] Therefore, it is not unreasonable to expect that potential GradCare purchasers will postpone their applications to minimize the overall cost of health insurance and, therefore, not be covered by GradCare while they are students.

For the above reasons, I conclude that health insurance coverage offered to new college and university graduates, even though it may become effective for some individuals before the actual graduation date, does not cover "students" who may be insured under a group policy issued pursuant to §110. Therefore, I find GradCare cannot be characterized as "student" insurance that is permissible under that statute.[18]

Tufts argues that the Division's application of c. 176M to GradCare improperly expands the scope of c. 176M to cover all health insurance products. I find, however, that

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[16] The period of time for which GradCare could cover a student is quite limited. Tufts stated that a person could apply for coverage thirty days before graduation, and it would become effective at the beginning of the month following the date of application. Thus, a person with a graduation date of May 15 who applied for GradCare in April would be covered as a student for only two weeks.

[17] Mr. Kingsdale agreed that a person could be covered under GradCare and other health insurance, and that the payment of claims would require coordination of benefit payments. Selling health insurance to graduating seniors that provides coverage while they are covered as students under an existing plan also raises a question of fairness. The students whom GradCare targets must, while they are students, either participate in a QSHIP or qualify for a waiver that is granted only if they are covered under a plan offering comparable coverage. The provisions of such plans for terminating dependent coverage are not on the record; the Tufts PPO certificate provides that when a student graduates, coverage continues until the last day of the month of his or her graduation.

[18] The Division observes that the relationship between potential GradCare purchasers and colleges and universities is that of "alumni." Alumni are not a class specified in §110 as one that may be covered under a group policy issued to an educational institution. That Tufts does not intend to offer GradCare through an alumni association is not a sufficient basis for excluding it from regulation as a group health plan subject to c. 176M.

the Division's reading of c. 176M to apply to group products that are not issued in compliance with §110, or are not defined as exempt from c. 176M, is consistent with an application of §110 that limits group health coverage to entities and classes of people that the statute specifically describes. The Division's interpretation of c. 176M does not alter the scope of §110; it does ensure regulation of health insurance products that are issued to entities other than those listed in §110, or that cover classes of persons that are not specified in that statute.

Tufts asserts that GradCare should not be subject to c. 176M because the statute addresses insurance that is issued only to "natural persons," while GradCare will be issued to educational institutions. A "health plan" is defined under c. 176M as, among other things, any general, blanket or group policy of insurance, and any preferred provider arrangement issued pursuant to G.L. c. 176*I*.[19] The statute places no limitations on and makes no reference to the identity of the policyholder. Because c. 176M, by its terms, applies to group health plans, structuring GradCare as a group plan does not eliminate it from the regulatory ambit of c. 176M.

Chapter 176M further defines a nongroup health plan as any health plan, including an individual, general, blanket, or group policy, that is "issued, renewed or delivered, within or without the commonwealth," to a natural person who is a resident of Massachusetts, including a certificate issued to an eligible natural person, under a policy issued to a trust or association.[20] Consequently, c. 176M provides that a health plan may be "delivered" to an enrolled individual; it does not require that the policy be "issued" to that person.[21] Further, c. 176M recognizes that a health plan may be "delivered" in the form of a certificate, including a certificate evidencing coverage under a policy issued to a trust or association. The statute also does not, by its terms, limit the identity of a third party policyholder to a trust or association. I am not persuaded that the requirement in c.

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[19] As noted above, the Tufts PPO Option 2 was approved under that section.

[20] The statute does not define "natural person." However, a "member" of a health plan is defined as any and all individuals enrolled in that plan; it appears that a natural person is viewed as an individual. Chapter 176M also allows a health plan to insure an individual's dependents, although GradCare does not include that feature. The choice of the term "natural person" in c. 176M may be contrasted with the definition of "person" in G.L. c 176*O*, the Health Insurance Consumer Protection Act. For purposes of that statute "person" includes individuals, corporations, partnerships, other entities, and combinations thereof.

[21] This language is consistent with the process of distributing certificates of insurance or other evidence of coverage to individuals covered under a policy issued to a group policyholder, and supports the Division's position that c. 176M may regulate group insurance.

176M that a health plan be "issued, renewed or delivered" to a natural person provides a meaningful basis for determining that a particular group plan falls outside its regulatory boundaries. As Tufts notes, it is obligated to send an evidence of coverage to individuals who are insured through any type of group.[22]

Tufts argues that GradCare should be found to be a group product because it will allow a cohort of new college graduates, who might otherwise be uninsured, to obtain health insurance at a reasonable cost.[23] Group underwriting, it argues, allows GradCare to be offered at a lower price; Tufts asserts that GradCare provides better coverage and lower deductibles than comparably priced nongroup policies. In support of its argument, Tufts submitted a document reporting the results of a survey of 105 families it conducted in April 2004 which concluded that more than 50 percent of college graduates would not have a job with insurance immediately after graduation. Even accepting the survey finding as accurate, Tufts does not explain why new college graduates have a need for health insurance that differs from that of other people who lose health insurance because they no longer satisfy group eligibility rules. Moreover, Tufts offers no legal support for its theory that a perceived need for health insurance coverage would justify an expansive interpretation of §110.

Although new college graduates have been identified as a cohort that may lack health insurance, the loss of health insurance because of a change in student status is not unique to that class of individuals. Graduate, as well as undergraduate students, may lose coverage upon leaving school, with no replacement immediately available. People who have coverage as members of a group permitted under §110 may also lose coverage when they no longer satisfy the group membership criteria. The need for health insurance is universal; all those who lose access to such coverage are equally vulnerable to economic harm if they are sick or injured. Even if there were some elasticity under §110, I am not persuaded that the class that GradCare proposes to insure is so uniquely situated that it would justify special treatment.

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[22] Although Tufts' witness was not aware of specific procedures relating to delivery of an evidence of coverage to GradCare purchasers, he testified that typically the carrier sends out the certificate to the enrollee. The evidence of coverage in this case appears to be the document entitled certificate of insurance that is part of Exhibit 1.

[23] The availability of GradCare would also undoubtedly soothe anxious parents whose children, upon graduation, may no longer be eligible for dependent coverage.

The value of developing insurance products that will provide health insurance at a reasonable cost to individuals who do not have access to such coverage through an employer or other group allowed under §110 is undisputed. Chapter 176M ensures that health insurance coverage, which is available to the universe of people who do not have access to coverage through one of the entities or as a member of a class enumerated in §110, meets uniform standards and that rates fall within certain bounds. As discussed above, the legislature has precisely identified the permissible group policyholders and specifically defined the classes of persons who may be insured under group insurance issued pursuant to §110. Over time, changes to those groups and classes have been made, and must continue to be made, by the legislature.

The conclusion that GradCare is not a group plan authorized by §110 does not prevent new college graduates from obtaining health insurance coverage. It simply means that coverage offered to them must comply with the requirements of c. 176M. On this record, I make no findings on the extent to which GradCare, in its current configuration, conforms to that statute.

IV. Conclusion and Order

For the above reasons, I find that GradCare is not a group insurance product that is authorized under G.L. c. 175, §110. I further find that, because GradCare is not authorized by c. 175, the negotiation, solicitation or sale of GradCare constitutes a violation of G.L. c. 175, §3. Therefore, Tufts is hereby ordered to cease and desist from negotiating, soliciting, selling or otherwise aiding in the transaction of contracts to purchase GradCare until such time as the product is approved by the Division of Insurance.

Dated: August 9, 2005

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Jean F. Farrington
Presiding Officer

Affirmed this 9th day of August, 2005.

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Julianne M. Bowler
Commissioner of Insurance